

# CRIMINAL YEAR SEMINAR

April 19, 2019 - Tucson, Arizona  
April 26, 2019 - Phoenix, Arizona  
May 3, 2019 - Chandler, Arizona



## CRIMINAL RULES UPDATE

Presented By:

**The Honorable David Cutchen**  
Judge of the Gilbert Municipal Court  
&  
**Gary Shupe**  
Assistant Phoenix City Prosecutor

Distributed By:

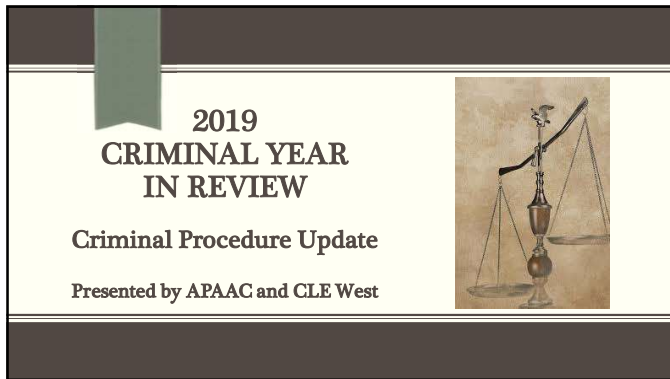
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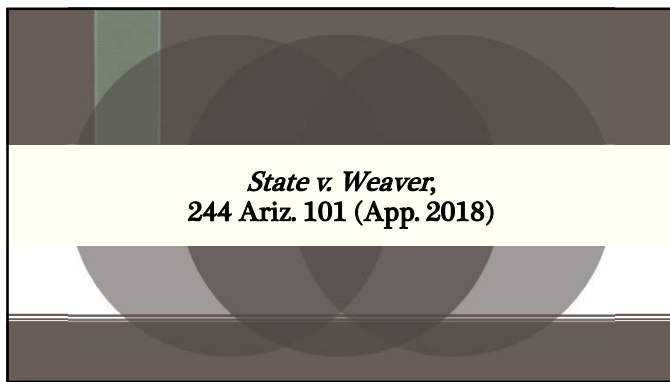
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### Officers investigate a disturbance

- Weaver seen holding a “crude marijuana pipe”
- Took a boxer’s stance, asked officers: “Wanna go for it?”
- Officer warned Weaver, calm down or you’ll be tased.



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### *State v. Weaver*

Arrested for:

- POM
- possession of drug paraphernalia
- resisting arrest



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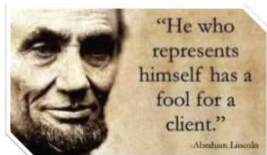
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### Just before the jury is brought up . . .



- Weaver asked to represent himself
- Weaver not prepared, asked for MTC
- Judge: untimely request, would delay and disrupt
- Prosecutor attempted to prevent error
- Judge again denied request to self-represent

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**State v. Weaver**

- Defendant has the right to self-representation
- Request to self-represent must be timely: before "meaningful" proceedings begin
- Request to self-represent must not delay or disrupt the proceedings
  - defendant need not be skilled to mount a defense
- Unfounded denial of the right to self-represent is structural error



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***Gilbert Prosecutor's Office v. Foster (Beatty, Real Party in Interest),***  
**245 Ariz. 15 (App. 2018)**

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***State v. Bush,***  
**244 Ariz. 575 (2018)**

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### *State v. Bush*

#### **Rule 10.3 Changing the Place of Trial**

(b) Prejudicial Pretrial Publicity. If the grounds to change the place of trial are based on pretrial publicity, the moving party must prove that the dissemination of the prejudicial material probably will result in the party being deprived of a fair trial.

#### **ARCrP 18.5(d) Voir Dire Examination**

... the court must allow the parties a reasonable time, with other reasonable limitations, to conduct a further oral examination of the prospective jurors. However, the court may limit or terminate the parties' voir dire on grounds of abuse. ...

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*State v. Bush*

- Despicable acts were committed; garnered notoriety in the media
- Motion to change venue due to "overwhelmingly" prejudicial and inflammatory statements
- Trial court denied the motion: Bush hadn't shown prejudice

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### Change of venue—presumed prejudice



- Courts rarely presume prejudice due to pretrial publicity
- Publicity must have been so unfair, so prejudicial, and so pervasive that jurors' impartiality is lost
- Factors to consider: when coverage occurred, whether it was sensational or factual, and whether community hysteria was created

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### Change of venue—actual prejudice

- Under ARCrP 10.3(b), the defendant must show that jurors are not impartial.
- Did pretrial publicity probably result in the defendant being deprived of a fair trial?



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Voir dire

- Defendant asked to show graphic photos and play 911 recording
- Trial court: uh, no
- But defendant could refer to case as "first degree, premeditated, cold-blooded, inexcusable murder"
- And could describe gruesome, gut-wrenching evidence

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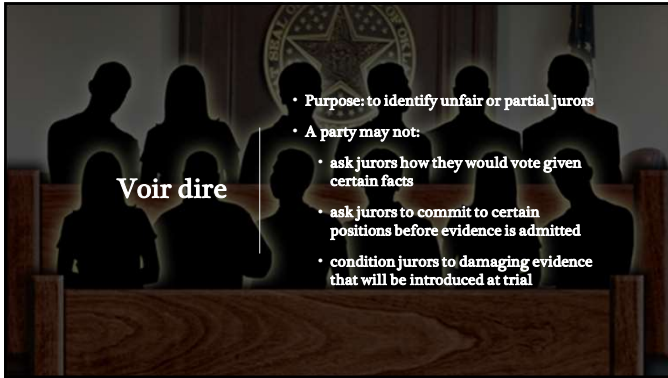
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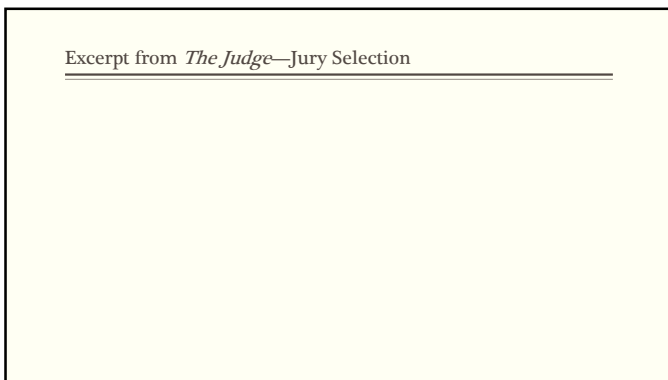
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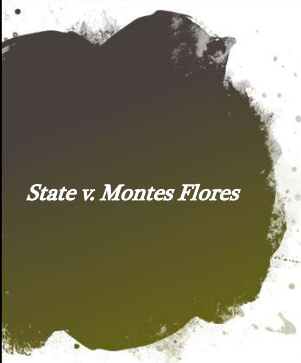
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*State v. Montes Flores*

ARCrP 13.5(b)

- an indictment "limits the trial to the specific charge or charges stated in the . . . indictment"
- absent the defendant's consent, "a charge may be amended only to correct mistakes of fact or remedy formal or technical defects"
- a charging document is "deemed amended to conform to the evidence admitted during any court proceeding"

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*State v. Montes Flores*

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- Finger-gun robbery at a convenience store
- Defendant's hand was under a shirt and waistband
- "Give me all your money, I have a gun."
- Clerk gives the defendant cash, the defendant flees



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*State v. Montes Flores*

Indictment	Jury instruction
<ul style="list-style-type: none"> <li>▪ "taking property of another . . . while . . . armed with a . . . simulated deadly weapon"</li> <li>▪ A.R.S. § 13-1904(A)(1): "[a] person commits armed robbery if, in the course of committing robbery as defined in § 13-1902, such person . . . <i>is armed with</i> a . . . simulated deadly weapon"</li> </ul>	<ul style="list-style-type: none"> <li>▪ Told the jury that it could find Montes Flores guilty if it determined that he had "used or threatened to use a simulated deadly weapon"</li> <li>▪ A.R.S. § 13-1904(A)(2): "[a] person commits armed robbery if, in the course of committing robbery as defined in § 13-1902, such person . . . <i>uses or threatens to use</i> a . . . simulated deadly weapon"</li> </ul>

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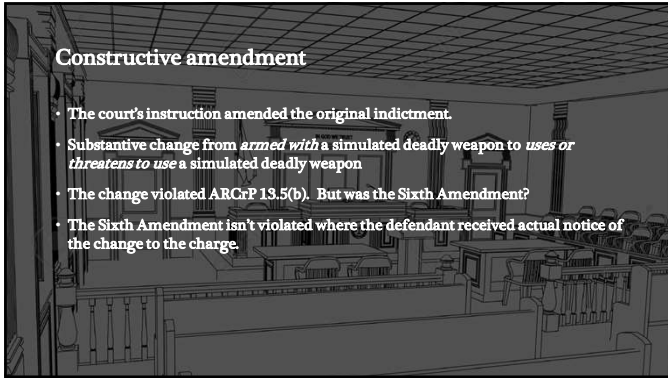
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**Constructive amendment**

- The court's instruction amended the original indictment.
- Substantive change from *armed with* a simulated deadly weapon to *uses or threatens to use* a simulated deadly weapon
- The change violated ARCrP 13.5(b). But was the Sixth Amendment?
- The Sixth Amendment isn't violated where the defendant received actual notice of the change to the charge.

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***State v. Kellywood,***  
**246 Ariz. 45 (App. 2018)**

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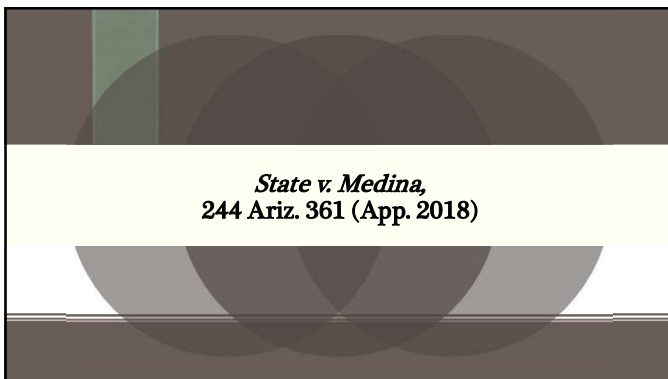
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***State v. Medina,***  
**244 Ariz. 361 (App. 2018)**

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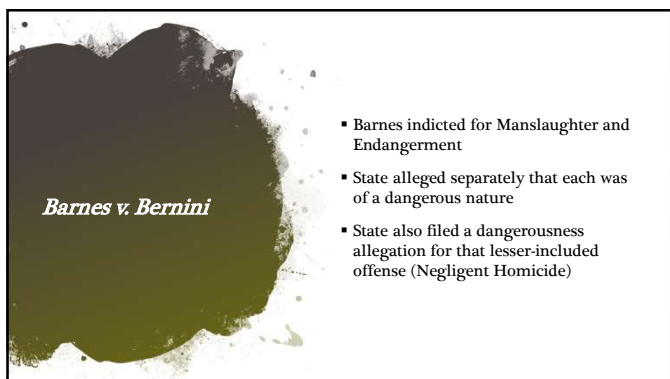
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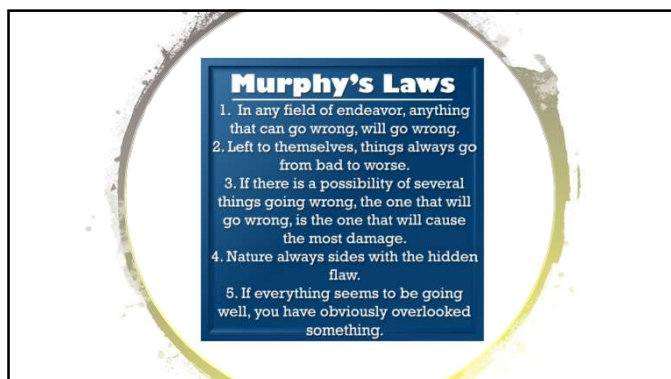
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***Barnes v. Bernini***

- Trial, guilt phase: court gave instructions for Manslaughter and Endangerment
- The court also instructed the jury about dangerousness for those two offenses.
- Murphy's law: court instructed on Negligent Homicide *but omitted* the dangerousness allegation
- Verdict: guilty Negligent Homicide and Endangerment; not guilty Manslaughter

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Missed interrogatory—what now?

- The state asked to submit an interrogatory to the jury.
- Barnes objected, and the court denied the request.
- The state later sought to empanel a jury to consider the issue.
- That request the court granted.

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***Barnes v. Bernini***

## Sentencing-allegation procedure

- Procedure used did not comply with ARCrP 19.1(c)—aggravation phase follows guilty phase
- No error in having a jury decide the dangerousness allegation for Negligent Homicide after the verdict

## When is a verdict recorded?

- ARCrP 22.5(a)(1): discharge the jury when verdict has been recorded under ARCrP 23
- But....ARCrP 23 doesn't mention recording a verdict
- Court of Appeals: verdict not recorded when announced but after jury polled

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***State v. Perry,*  
245 Ariz. 310 (App. 2018)**

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***State ex rel. Brnovich v. Miller,*  
245 Ariz. 323 (App. 2018), rev. denied (2019)**

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### Substantive amendment to ARCrP 32

#### #1

- Current Rule 32 divided into proposed Rules 32 and 33; each rule is self-contained
- Proposed Rule 32 exclusively for defendants who went to trial or had a contested probation-violation hearing
- Proposed Rule 33 exclusively for defendants who pleaded guilty or admitted a probation violation

#### #2

- Proposed Rules 32.6(b) and 33.6(b) contain rules of discovery for PCR proceedings; "codify" but also exceed *Canion v. Cole*
- Notice stage: defendant must show substantial need
- Petition stage: defendant must show good cause

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### Substantive amendment to ARCrP 32

#### #3

- Proposed Rules 32.6(c) and 33.6(c) contain extensive requirements or avowals that PCR counsel must include in a Notice of No Colorable Claim

#### #4

- Proposed Rules 32.6(f) and 32.6(f): defendant waives the attorney-client privilege for any information necessary to allow state to rebut an IAC claim

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### Substantive amendment to ARCrP 32

#### #5

- In Capital Cases: page limit doubled for petitions (from 80 to 160); also doubled for responses and replies

#### #7

- Proposed 32.11(d) and 33.11(d): trial judges can order competency evaluations for defendant's when necessary to present claim

#### #6

- change-of-judge provision added in proposed Rules 32.10(a) and 33.10(a) PCR proceeding is assigned to a new judge

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*State v. Helm,*  
245 Ariz. 185 (App. 2018), *rev. continued*

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**Questions?**

The Honorable David Cutchen  
Gilbert Municipal Court

Gary L. Shupe  
Assistant Phoenix City Prosecutor

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